IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 31ST OCTOBER 2007 / 9TH KARTHIKA 1929

Crl.Rev.Pet.No. 3758 of 2007()

CRA.222/2006 of ADDL.SESSIONS COURT-II, KOZHIKODE
CC.92/2005 of JUDL.MAGISTRATE OF FIRST CLASS-II, THAMARASSERY

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REVN. PETITIONER: APPELLANT/ACCUSED:

VELAYUDHAN @ RAJAN KOLIKKADAVIL,
AGED 54 YEARS, SON OF VELAYUDHAN NAIR,
VADAKKEKARA HOUSE, KUMARANELLOOR P.O.,
KOOTTALIDA, BALUSSERY, KOZHIKODE.

BY ADV. SRI.JACOB ABRAHAM
SMT.KOCHUMOL KODUVATH

RESPONDENTS: RESPONDENTS/COMPLAINANT:

1. CHINNAMMA, AGED 47 YEARS,
WIFE OF LATE MR.AGUSTI, PENAKKAPPILLIL HOUSE,
PERUMPOOLA, MANJAKKADAVU P.O., KOZHIKODE.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 31/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**V.RAMKUMAR, J.**

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**Crl.R.P. No. 3758 of 2008**

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**Dated : 31-10-2007**

**O R D E R**

In this Revision filed under Section 397 read with Sec. 401 Cr.P.C. the petitioner who was the accused in C.C. No. 92 of 2005 on the file of the J.F.C.M.II, Thamarassery, challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act').

2. I heard the learned counsel for the Revision Petitioner and the learned Public Prosecutor.

3. The learned counsel appearing for the Revision Petitioner re-iterated the contentions in support of the Revision. The courts below have concurrently held that the cheque in question was drawn by the petitioner in favour of the complainant on the drawee bank, that the cheque was validly presented to the bank, that it was dishonoured for reasons which fall under Section 138 of the Act, that the complainant made a demand for payment by a notice in time in accordance with clause (b) of the proviso to Section 138 of the Act and that the Revision Petitioner/accused failed to make the payment within 15 days of receipt of the statutory notice.

4. the learned counsel for the revision petitioner made the following further submissions before me:-

The specific case of the revision petitioner accused was that

he had not entered into any transaction with the first respondent/complainant who is not known to him and who is a stranger . The inability of the complainant to identify the accused in Ext. D1 photograph will show that the case of the complainant that the accused borrowed a sum of Rs. 1,00,000/- is totally false. The direction by the lower appellate court to pay compensation of Rs. 1,00,000/- under Section 357 (3) Cr.P.C. is without any enquiry as to the means of the accused is also illegal in the light of the decision reported in ***Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Another - 2007 (6) SCC 528.***

5. I am afraid that I cannot agree with the above submissions. Both the courts below have considered the contentions of the revision petitioner based on Ext.D1 photograph . The photograph was not proved to be a recent photograph of the accused so as to enable the complainant to identify the accused from the photograph. The complainant examined as P.W.1 had no difficulty in identifying the accused in Court. Both the courts below have considered the contentions and negatived the plea of the revision petitioner/accused. Now coming to the question of compensation, ***Dilip S. Dahanukar's*** case was really a case which arose out of a direction by the appellate court while suspending the sentence under Sec. 389 I.P.C. to deposit a sum of Rs. 15,00,000/- as a condition for suspending the sentence. The contention before the Apex court was that such a condition was an onerous condition. It was only incidental that the question of compensation under

Sec. 357 (3) was gone into by the Apex Court. While awarding compensation under Sec. 357 (3) Cr.P.C. in the light of the above decision the court has to conduct an enquiry and consider the financial capacity of the accused to pay the compensation. The said decision is no authority for the proposition that even for awarding compensation from out of the fine amount for which the court is given power to award twice the cheque amount. In the light of the sentence proposed hereinafter, this consideration of the above contention may be irrelevant.

6. Both the courts have considered and rejected the defence set up by the revision petitioner while entering the above finding. The said finding has been recorded on an appreciation of the oral and documentary evidence. I do not find any error, illegality or impropriety in the finding so recorded concurrently by the courts below. The conviction was thus rightly entered against the petitioner.

7. What now survives for consideration is the question as to whether a proper sentence has been imposed on the Revision Petitioner. Having regard to the facts and circumstances of the case, I am, however, inclined to modify the sentence in the light of the recent pronouncement by the Supreme Court that no default sentence can be imposed for an order for compensation under Section 357(3) Cr.P.C. Accordingly, the sentence imposed on the revision petitioner is set aside and instead he is sentenced to undergo imprisonment till rising of court and to pay a fine of Rs. 1,00,000/- (Rupees one lakh only) which shall

be deposited before the trial court within five months from today failing which he shall suffer simple imprisonment for three months. The fine amount as and deposited shall be paid to the first respondent complainant as compensation under Sec. 357 (1) Cr.P.C.

This Revision is disposed of confirming the conviction but modifying the sentence as above.

**V. RAMKUMAR, JUDGE.**

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